IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.563 OF 2001

DIST. MUMBAI

Hiralal Kusumlal Vishwakarma @)
Harish Nepali, presently lodged at)
Yerawada Central Prison, Pune.)..Appellant/Orig.Accused 1

Versus

The State of Maharashtra) ... Respondents

Ms. D.M. Shah, advocate (appointed) for the appellant (A-1).

Dr. F.R. Shaikh, A.P.P. for the respondent- State.

ALONG WITH

CRIMINAL APPEAL NO.585 OF 2001

DIST. MUMBAI

Nitin Dattaram Lad, R/o. Chawl No.4,)
Room No.3, Babharekar Nagar,)
Kandivli (West), Mumbai – 400 067.)..Appellant/Orig.Accused 6

Versus

The State of Maharashtra) ... Respondents

Mr. S.P. Kadam for the appellant (A-6).

Dr. F.R. Shaikh, A.P.P. for the respondent- State.

CORAM : SMT. RANJANA DESAI & D.G. KARNIK, JJ.

DATE ON WHICH THE JUDGMENT RESERVED : 21ST APRIL, 2006.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 2ND MAY, 2006.

JUDGMENT : (Per Smt. Ranjana Desai, J.)

1. Criminal Appeal No.563 of 2001 is filed by Hiralal Kusumlal Vishwakarma @ Harish Nepali, original accused 1 (for convenience, "A-1"). Criminal Appeal No.585 of 2001 is filed by one Nitin Dattaram Lad @ Hawaldar. As per the charge, this appellant is original accused 6. However, surprisingly, in the title of the impugned judgment, Nitin Lad is shown as accused 4. This has created a lot of confusion. We feel that the learned judge ought to have been more careful. Not only that this mistake has caused great inconvenience to us but it has also had a very damaging effect on the prosecution case

as would be evident as we proceed with the assessing of the evidence. To avoid confusion and for the sake of clarity, we shall refer to the appellant in Criminal Appeal No.585 of 2001 as either Nitin Lad or A-6.

2. A-1 and A-6 were tried along with Mohmed Arifisar Ahmed Shaikh, Nandu Badal Banerjee, Prakash Kashinath Salvi, Nitin Bhikubhai Rathod and Kanhyalal Mangilal Gandhi, original accused 2, 3, 4, 5 and 7 respectively (for convenience, "A-2, A-3, A-4, A-5 and A-7" respectively) in Sessions Case No.1370 of 1995 in the Sessions Court at Bombay. The charge indicates that all the accused were charged under section 120-B of the Indian Penal Code (for short, "the IPC"). A-1, A-2, A-4 and A-6 along with A-3 and A-5 were charged for offence punishable under section 452 read with section 120-B of the IPC. A-1 to A-6 were charged for offence punishable under section 395 read with section 397 and 120-B of the IPC. A-1 to A-6 were also charged for offence punishable under section 396 read with section 120-B of the IPC. A-7 was charged for offence punishable under section 411 of the IPC. A-1 to A-4 were charged under section 325 read with section 27 of the Indian Arms Act. By judgment and order dated 4th & 9th April, 2001, the learned Additional Sessions Judge acquitted A-5 Nitin Bhikubhai Rathod and A-7 Kanhayyalal M. Gandhi. He convicted A-1, A-2, A-4 and A-6 for offence punishable

under section 452 of the IPC and sentenced them to suffer seven years rigorous imprisonment. Fine of Rs.5,000/- was imposed on each of them on that count and, in default, they have to undergo further rigorous imprisonment for six months. A-2, A-3, A-4 and A-6 were held guilty under section 395 read with section 397 of the IPC and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/- each and, in default of payment of fine, to suffer further rigorous imprisonment for six months. A-1 was held guilty of offences punishable under sections 395, 396 and 397 of the IPC and was sentenced to undergo rigorous imprisonment for life under section 396 of the IPC. In view of this, no separate sentence was imposed on him under section 395 read with section 397 of the IPC. No separate sentence was imposed under the Indian Arms Act against A-1 to A-4. Being aggrieved by this judgment and order, A-1 and A-6 have preferred the instant appeals. Since this court is concerned only with the case of A-1 and A-6, we shall concentrate only on their case and that part of the evidence which is relevant to their case.

3. At the trial, the prosecution case in brief was that on 26/5/1995, at about 9.00 p.m. four persons entered the shop known as Kamal Jewellers. After they entered the shop, one of them pulled the shutter down. One person was guarding the door. Two of them

whipped up their arms viz. revolvers for threatening the inmates of the shop. The accused threatened the inmates with the said weapons and removed ornaments and jewellery from the shop. Some of the jewellery was handed over by PW-3 Umesh to the accused. Some of the jewellery was taken by the accused by force. The accused broke open the glass show case and removed the ornaments lying there. After looting the shop, they came out. At that time, the owner of the shop Kantilal Shah, the deceased came out and raised cries as "chor-chor, pakdo, pakdo." However, the people in the area did not come forward to help him. One of those four accused, shot at Kantilal Shah. Thereafter, they disappeared. Kantilal Shah fell down on account of the shot fired at him. He was rushed to Mangalmurti Hospital at Charkop. The doctors at the hospital refused to admit him as it was a police case. He was then taken to Bhagwati Hospital, where he succumbed to the injuries.

4. Upon admission of Kantilal Shah in the hospital, information was received by the police at about 10.10 p.m. PW-19 PSI M.S. Salunkhe, who was attached to Kandivali Police Station at the relevant time, intimated about the incident to his superiors. He then went to the hospital. PW-3 Umesh was there. His statement came to be recorded. It is at Ex-17. It was treated as FIR. On the basis of the same, investigation was started.

5. A-1 came to be arrested on 1/8/1995 and A-6 came to be arrested on 3/8/1995. Identification parade was held in which the prosecution witnesses identified A-1 and A-6. After completion of the investigation, the accused came to be charged as aforesaid. In support of its case, the prosecution examined as many as 22 witnesses. The defence of the accused was one of denial. After perusing the evidence on record, the learned Sessions Judge convicted the accused as aforesaid and, hence, these appeals.

6. We have heard, at some length, Ms. Shah, the learned counsel appearing for A-1, Mr. Kadam, the learned counsel appearing for A-6 and Dr. Shaikh, the learned A.P.P. appearing for the State. With the assistance of the learned counsel, we have gone through the evidence and the record.

7. Ms. Shah, the learned counsel for A-1 submitted that there is hardly any evidence on record to connect the accused with the crime in question. She submitted that PW-3 Umesh, the employee of deceased Kantilal Shah claims to have seen A-1 while he was running away. He says that it was A-1, who fired the shot at the deceased. She submitted that it is inconceivable that PW-3 Umesh would have observed minutely the features of A-1 so as to identify him in the

identification parade because A-1 was admittedly running away. She submitted that similarly, it was not possible even for the other identifying witnesses to identify A-1. There is always a possibility of mistaken identity. Ms. Shah pointed out that PW-3 has at one stage stated that the parade was conducted at Cuff Parade and later on he corrected himself and stated that it was held at Arthur Road. Therefore, it is doubtful whether he was present there at all. According to Ms. Shah, the identification parade was held in breach of the guidelines laid down in the High Court Criminal Manual and, therefore, the identification of A-1 in the identification parade cannot be relied upon. The learned counsel submitted that in any event, intention to murder the deceased cannot be attributed to A-1. It is because the deceased raised a cry that A-1, without any premeditation and out of fear, fired at him. Therefore, the accused could at the most be convicted under section 304 Part I or Part II of the IPC. The learned counsel submitted that the evidence of discovery of stolen articles at the instance of A-1 also does not inspire confidence. But assuming that this court believes the said evidence, A-1 could at the most be convicted under section 411 of the IPC as he could then be called a receiver of the stolen property. He certainly cannot be connected with the murder of the deceased. The learned counsel, therefore, submitted that the conviction of A-1 be quashed and set aside or in the circumstances of the case, a lesser

punishment may be given to him by bringing his conviction either under section 304 Part I or Part II of the IPC or under section 411 of the IPC.

8. Mr. Kadam, the learned counsel appearing for A-6 submitted that the learned judge has confused A-6 with A-4. The evidence implicating A-4 has been taken into consideration and A-6 has been convicted. He pointed out that according to the prosecution, in the identification parade held on 8/8/1995, the prosecution witnesses identified A-6. The learned counsel contended that this identification cannot be accepted for the simple reason that admittedly the same dummies were used when A-6 was put in the identification parade for identification and this fact is admitted by PW-6 Sitaram Jadhav, the Special Executive Magistrate, who conducted the identification parade. He submitted that this is a clear violation of the guidelines laid down in the High Court Criminal Manual and, therefore, this identification can never be relied upon. The learned counsel pointed out that PW-3 Umesh has admitted that the identification parade was held in an open place. He, therefore, submitted that this identification parade evidence needs to be kept out of consideration. In this connection, he drew our attention to the judgment of this court in *Vilas Vasantrao Patil v. The State of Maharashtra through Bhandup Police Station, 1996 Cri.L.J. 1854*. Mr. Kadam pointed out

that PW-12 Gopal, the pancha to panchanama (Ex-44) under which the house of A-4 was searched, has stated that the box of aluminum containing ornaments was seized from the house of A-4. He has identified Prakash Salve as A-4 in the court. Ex-44 pertains to A-4. The learned counsel submitted that this discovery cannot be taken against A-6. It is an admitted position that nothing was recovered at the instance of A-6 and, therefore, it was wrong for the learned judge to use this seizure of ornaments against A-6. The learned counsel contended that in the circumstances, the conviction and the sentence of the accused be set aside.

9. PW-17 Dr. Pujari had done the post-mortem on the deceased on 27/5/1995. He found a fire arm wound of entry on right side chest front at the level of nipple. According to him, the cause of death was haemorrhage and shock due to fire arm injury (unnatural). He recovered one bullet from the body. He proved the post-mortem notes (Ex-54). Therefore, the fact that the deceased died of fire arm injury cannot be denied.

10. So far as A-1 is concerned, in our opinion, the prosecution has proved its case beyond reasonable doubt. That the incident in question took place has not been disputed by the appellants. PW-3 Umesh was serving in Kamal Jewellery, the jewellery shop of the

deceased where the incident took place. He has stated that on 26/5/1995, when they were about to close the shop at about 9.15 p.m., four persons entered the shop one after another. According to him, the last one pulled the shutter down. One of them pointed a revolver at him and the other pointed a revolver at the deceased. One person was guarding the door. The fourth person collected the jewellery. They asked him to give the ornaments. They were giving threats. He, therefore, gave the ornaments to the fourth person. This witness then took out the tray from the show case and kept it above it. The fourth person put the ornaments in his pocket. The second culprit also jointed him and put the ornaments in his pocket. He broke the glass of the show case and took the ornaments. After collecting the ornaments, the culprits opened the shutter and left the shop. The deceased came out of the shop and started shouting for help. He was saying “pakdo pakdo, chor chor.” According to PW-3 Umesh, he also came out from the shop. One of the culprits fired in the air and the other shot was fired at the deceased, who sustained injury on his chest. The culprits fled towards sector No.6. The deceased was taken to the hospital in a rickshaw. About half an hour after the incident, this witness went to the Bhagwati hospital by bus, after closing the shop. According to him, the police officer at the Bhagwati hospital made enquires with him. His statement was recorded. It is at Ex-17. It was treated as FIR.

10. PW-3 Umesh has further stated that he was called to Arthur Road Police Station in the month of August, 1995 and in the identification parade, he identified A-1 as the person, who had fired bullet at the deceased. He has also stated that on 14/8/1995, he was called to the police station. At the police station, jewellery consisting of mangalsutra, necklace, rings, etc. were shown to him. He identified those ornaments as being the ornaments from their shop.

11. In our opinion, PW-3 Umesh can be safely relied upon. Being the employee of the deceased his presence at the scene of offence is natural. His evidence appears to us to be cogent and credible. It is corroborated by the other evidence on record to which we shall soon advert.

12. PW-6 Sitaram Jadhav is the Special Executive Magistrate, who had conducted the identification parade. He has stated that he conducted the identification parade on 8/8/1995. He has given the names of the persons, who identified A-1 as the person who had fired at the deceased. He has stated that the parade was conducted between 3.00 p.m. and 6.00 p.m. According to him, he contacted officer Nalawade at the jail and selected two panchas for the parade.

He met the identification witnesses inside the jail. They were sitting in the first room of the office of the jail. Along with the panchas, he went inside the jail to see the suspects. He has stated that the suspects were not visible from the room where the witnesses were sitting. He saw the accused and their features and directed the jail authorities to arrange for 36 dummies similar in appearance with the accused. They arranged for 12 dummies initially. He and the panchas inspected the room where the parade was to be held after the dummies were made to sit in a separate room. He has clarified that the inside of the premises was visible from outside as it was a shed. However, the said shed was not visible from the place where the witnesses were sitting. According to him, with the help of the panchas, 12 dummies and two suspects were brought to the parade room. The dummies were made to stand in a row. The suspects were directed to change their clothes if they so desire, which they declined. They were directed to stand amongst the dummies as per their choice. A-1 and A-2 were part of the first parade. The panchas were directed to call the identifying witnesses one after other. According to him, identifying witnesses Umesh Choudhary, Kanjibhai Patel and Anil Parab identified A-1 as the person who had a revolver in his hand and who fired at the deceased. Identifying witness Dayanand Gawde identified A-1 as the person who was running with a revolver near his panbidi shop. He has also stated that witnesses Aklesh

Varma, Shivchand Gupta and Khandu Jadhav also identified A-1.

13. PW-6 Sitaram Jadhav has been cross-examined as regards the first part of the identification parade. He is consistent in his cross-examination. There is absolutely no infirmity in his evidence as regards the first part of the parade. We have seen the memorandum of identification parade. We have carefully scrutinised the evidence of PW-6 Jadhav. From the memorandum and the evidence of PW-6 Jadhav, it is clear that all the witnesses have identified A-1. Witnesses Umesh, Kanji Patel and Anil Parab had stated that A-1 had a revolver in his hand and he fired at the deceased and witness Dayanand Gawde has stated that he saw A-1 running with a revolver. It is true that other identifying witnesses have not given A-1 any role. But that in our opinion does not diminish the value of identification evidence. From their of evidence, it is established that on the relevant day at the relevant time, A-1 was at the scene of offence. We find that so far as the first part of the identification parade is concerned, the evidence of PW-6 Sitaram Jadhav, the SEM is unassailable. He has taken the necessary care in holding the identification parade. There is no breach of any guidelines of High Court Criminal Manual so far as the first part of the identification parade is concerned. On the basis of this, it can be held that the prosecution has proved that it is A-1, who had fired at the deceased.

14. PW-7 Anil Mhatre is the pancha. According to him, on 3/8/1995, at 9.00 p.m., he was called to the police station to act as a pancha. A-1 was present at the police station. A-1 made a statement pursuant to which, they went in a jeep via S.V. Road, M.G. Road to Babrekar Nagar. The vehicle was stopped near Ganesh Hotel. Thereafter, A-1 led them via galli to some premises. A-1 opened a steel trunk, which was in the said premises. From that, he removed a rexin bag and took out yellow metal ornaments and handed them over to the police. The ornaments were two mangalsutras, two pairs of ear-tops, one pair of bangles and one kolhapuri saz. The police recorded the same in the panchanama. The relevant panchanamas in this connection are Ex-32 and Ex-32A. This pancha has stood firm in the cross-examination. His evidence is also supported by the evidence of the investigating officer PW-20 PSI Nalawade, who was attached to the Kandivali Police Station. These ornaments have been identified by PW-3 Umesh, the servant of the deceased. We do not find any infirmity in the evidence of PW-3 Umesh.

15. Another piece of evidence so far as A-1 is concerned is the seizure of gun from him. PW-11 is Paresh Mamania. He is a pancha to Ex-41, under which A-1 was searched and a gun was recovered. The gun was loaded. He identified article-`C' as the same gun in the

court. PW-15 Artula Malleshwar Rao is the ballistic expert. According to him, article-`C' was in working condition and it was fired before it was delivered to him. He has stated that on 26/10/1995, he had received a cupro-jacketted bullet in a glass bottle from the police. He examined it and found it to have been fired from weapon (article-`C'). PW-17 Dr. Pujari has stated that he removed a bullet from the deceased's body and it was preserved in a glass bottle. PW-9 pancha Surendra Shinde has stated that the doctor handed over a bullet in a bottle to the police on 27/5/1995 and it was recorded in panchanama (Ex-37). All this establishes that it is A-1 who fired revolver (article-`C') at the deceased while committing dacoity. The deceased sustained a bullet injury which led to his death.

15. So far as A-6 Nitin Lad is concerned, however, the prosecution has not succeeded in proving its case. Nitin Lad was put up for identification in the second parade. PW-6 Sitaram Jadhav, the SEM has admitted in his evidence that as no dummies were available, old dummies were used in that parade. Using same dummies in the identification parade is clearly in breach of the guidelines pertaining to identification parades, laid down in the High Court Criminal Manual. In *Vilas Vasantrao Patil's case (supra)*, this court has held that instructions contained in the Criminal Manual issued by the High Court for conducting identification parades are not statutory

but have been consistently followed to ensure a fair and unassailable identification parade. In that case, the Executive Magistrate did not arrange for different sets of dummies for the purpose of identification of two sets of accused persons. This court held that the identification parade was held in breach of the instructions issued by the High Court in that behalf and hence the identification parade evidence could not be relied upon. The ratio of this judgment would be clearly applicable to this case. It is true that in *State of Maharashtra vs. Suresh (2000) 1 SCC 471*, the Supreme Court has held that if potholes were to be ferreted out from the proceedings of the Magistrates holding the identification parades, possibly no test identification parade can escape from one or two lapses and if a scrutiny is made from that angle alone and the result of the parade is treated as vitiated, every test identification parade would become unusable. It was further observed that if any modalities to be followed in a parade are diluted, officer conducting the identification parade should see to it that such relaxation would not impair the purpose for which the parade is held. From the observations of the Supreme Court, it is clear that minor breaches of the guidelines may not result in vitiating the entire identification parade evidence, but if there is any major breach of the guidelines which goes to the root of the matter and makes the identification of the accused suspect then that will result in vitiating the identification parade evidence. The

purpose of changing the dummies is very clear. The dummies must be similar in appearance to the accused, who are put in the identification parade for identification. Therefore, the exercise of finding similar persons has to be conducted by the Special Executive Magistrate. The fact that same dummies are made to stand in all identification parades in respect of different accused indicates that no effort is made to find out persons similar to the accused. That means the identification parade is a mere farce. That is what has happened in this case so far as the second part of the identification parade is concerned and, therefore, we are not in a position to rely on the identification of A-6 Nitin Lad in the identification parade.

16. Besides, as we have already noted, the learned judge has confused A-4 Prakash Mahadev Salve with A-6 Nitin Lad. It is an accepted fact that there is no recovery from A-6 Nitin Lad. PW-12 Gopal Choudhary is the pancha to panchanama (Ex-44). According to him, the house of A-4 was searched in his presence and from a box of aluminum, certain ornaments were seized. The ornaments were identified by him and they are at article G (Colly). We have perused panchanama (Ex-44). In that panchanama, it is recorded that the statement was made by A-4 Prakash Salve. Recovery is at the instance of A-4 Prakash Salve at his house in Jalgaon. PW-21 PSI Ligade has also stated that panchanama (Ex-44) pertains to A-4. As

per the charge, he is A-4. In the impugned judgment, the learned judge has observed that A-4 was found at his native place. His house was searched and from the house certain articles were taken charge of. In the title of the judgment, A-4 is shown as Nitin Lad. But as we have already stated this seizure is not from the house of A-6 Nitin Lad, but from the house of Prakash Salve. It was, therefore, wrong on the part of the learned Sessions Judge to rely on this discovery as an incriminating circumstance against A-6 Nitin Lad. We are, therefore, of the opinion that it is impossible to sustain the conviction of A-6 Nitin Lad. Hence, we pass the following order:

ORDER

> "The conviction and sentence of A-1 Hiralal Kusumlal Vishwakarma @ Harish Nepali under the impugned judgment and order is confirmed. The conviction of A-6 Nitin Dattaram Lad under sections 452 and 397 is quashed and set aside. A-6 Nitin Dattaram Lad is on bail. His bail bond stands cancelled."

17. Before we close, we record our appreciation for the assistance rendered to us by Ms. D.M. Shah, the learned counsel for A-1 and

Mr. Kadam, the learned counsel for A-6.

18. In the circumstances, Criminal Appeal No.563 of 2001 is dismissed and Criminal Appeal No.585 of 2001 is allowed.

(SMT. RANJANA DESAI, J.)

(D.G. KARNIK, J.)